University Moving & Storage Co. *and* Local 243, International Brotherhood of Teamsters.[1] Cases 7–CA–47352 and 7–CA–47750

June 11, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 29, 2005, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief to Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

University Moving and Storage (the Respondent) provides local and long-distance moving services. The allegations in this case arise from a lockout at the Respondent's facility in Farmington Hills, Michigan. Local 243, International Brotherhood of Teamsters (the Union) has represented 18 employees at the facility since June 1997. The most recent collective-bargaining agreement between the parties expired on May 31, 2003. On June 2, the first workday following the expiration of the contract, the Respondent initiated a lockout of unit employees, which was continuing at the time of the trial in April 2005.[2] In response, the Union established a picket line at the facility for approximately 3 months.

At issue here is the Respondent's denial of sick leave and vacation pay to locked out employees, as well as the Respondent's withholding of certification releases for two locked out employees. As we will explain, we find that the allegations regarding the denial of sick leave and vacation pay are timely, and we adopt the judge's finding that the denial violated Section 8(a)(5) of the Act, without passing on the judge's finding that it also violated Section 8(a)(3). With respect to accrued vacation benefits, we extend the limited remedy recommended by the judge to all employees who had accrued leave, regardless of whether they requested it. Finally, because we conclude that the Respondent acted consistent with its past practice, we reverse the judge's finding that the withholding of certification releases violated Section 8(a)(3).

II. SICK LEAVE AND VACATION BENEFITS

A. Sick Leave

The contract that expired on May 31, 2003 provides that employees with 1 year or more of seniority accrue 5 days of sick leave in each contract year. It further provides that unused sick leave will be paid to employees at the end of each contract year, and shall not be accumulated from year-to-year. Qualifying employees acquire a new allotment of sick days on the first day of each contract year, June 1.

Under the terms of the contract, all employees with at least 1 year of seniority who had worked at least 60 percent of working days in the previous 12 months accrued a new allotment of 5 more sick days on June 1, 2003. Those who worked less than 60 percent of working days received a prorata allotment of the 5 days.

At the time of the contract's expiration, five employees had accrued sick leave in amounts ranging between 1 and 3 days apiece.

B. Vacation Leave

The number of vacation days an employee receives depends on the number of years with the company, and becomes payable on the anniversary date of the employee's hiring. If vacation leave is not used in the year following the leave's accrual, it expires and cannot be taken.

At the time of the contract's expiration, 15 employees had accrued vacation days, ranging from 2 to 21 days. Qualifying employees also received a new allotment of vacation leave at their first anniversary date following the institution of the lockout.

Since the start of the lockout, the Respondent has denied employees their accrued sick leave and vacation benefits. At a bargaining session on December 22, 2003, local vice president, Thomas Weldon, told the Respondent that some employees had told him that they had not received vacation and sick pay they were owed. Respondent's representative, Patricia Peterson, replied that there was "no contract in place." Weldon then requested information on the vacation time that was still available to all employees, providing the Respondent with the names of employees who thought they had vacation owed to them. Attorney James Perry stated that Respondent would check its records and get back to the Union.[3]

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] This lockout was not alleged to be unlawful.

[3] The information requested by the Union was finally provided in a letter dated May 19, 2004. It revealed that 15 unit members were owed

In a letter dated March 1, 2004, Peterson stated the Respondent's position that employees were only entitled to paid vacation time during the term of the contract, and that the vacation provisions did not survive the expiration of the contract. The letter further stated that even if the vacation provisions continued beyond the contract's expiration, the Respondent did not believe that any unit employees were entitled to vacation pay. In April, several employees made requests for their accrued benefits. These requests were denied by the Respondent.

C. Timeliness of Charge

We first reject the Respondent's claim that the allegations regarding denial of sick leave and vacation pay are time barred under Section 10(b) of the Act. The charge relating to vacation pay was filed on August 6, 2004. The charge relating to sick pay was filed on September 29, 2004.

We adopt the judge's finding that the 10(b) period for the vacation leave allegation did not begin until March 1, 2004, the date of Peterson's letter announcing the Respondent's position that employees had no right to paid vacation leave. Prior to that date, the Respondent had not clearly stated that it was unwilling to pay the accrued vacation benefits. Although Peterson stated that "there is no contract in place" on December 22, 2003, she did not specifically state that the Respondent did not believe it owed the employees any benefits. In addition, Peterson's December statement was coupled with assurances that the Respondent would provide the Union with requested information regarding how much vacation leave each employee was assertedly owed, an indication that the Respondent did not foreclose the possibility that some employees would be paid vacation leave. We therefore find that Peterson's December statement was insufficient to put the Union on clear notice of a potential unfair labor practice at that time. Because the vacation pay charge was filed within 6 months of March 1, 2004, we find it timely.

With respect to the denial of sick leave pay, the Respondent never gave the Union adequate notice that it was challenging employees' post-contract entitlement before the Union filed its charge specifically relating to sick pay on September 29, 2004. As the judge noted, all of the Respondent's statements to the Union of its position on the subject of accrued leave pay prior to that date pertained specifically to vacation pay and not to sick pay. These statements therefore did not trigger the running of the 10(b) period with respect to sick pay.

Moreover, we find that the Union's September 29 charge regarding sick pay related back to its August 6 charge relating to vacation pay and consequently fell within the 10(b) period. As the judge found, the sick leave allegation was sufficiently related to the vacation pay allegation to make it appropriate to refer back to that charge to determine timeliness. In that regard, we note that the two allegations arose from the same legal theory and concerned the same factual circumstances. In addition, although the Respondent's defenses to the allegations are not identical, they are sufficiently similar to make relation back appropriate. *Redd-I, Inc.,* 290 NLRB 1115 (1988).

D. Denial of Accrued Sick Leave and Vacation Benefits

We adopt the judge's finding that the Respondent's denial of accrued sick leave and vacation benefits after the expiration of the contract violated Section 8(a)(5) of the Act. Board precedent clearly establishes that an employer must continue to apply the provisions of an expired contract until either a new agreement or impasse is reached. *Made 4 Film, Inc.,* 337 NLRB 1152 (2002). Bargaining was ongoing at the time of the contract's expiration, and there is no claim that the parties were at impasse. Consequently, the Respondent's failure to continue making payments of accrued sick leave and vacation benefits under the provisions of the expired contract constituted an unlawful unilateral change under Section 8(a)(5) of the Act.

Because it would not affect the remedy, we find it unnecessary to reach the judge's finding that the Respondent's actions also violated Section 8(a)(3) of the Act.[4]

E. Remedy

We reverse the judge's denial of accrued vacation benefits to those employees whose anniversary dates occurred after the institution of the lockout but before the Union's request of December 22, 2003. The judge found that such employees who did not request vacation leave prior to the expiration of that leave had forfeited their rights to the leave under the contract. We disagree, and find that the Respondent created an impression of futility surrounding the issue that reasonably would have discouraged employees from requesting the leave to which they were entitled.

Following the expiration of the contract, the Respondent ceased making payments for accrued sick leave,

vacation days and 5 were owed sick leave as of May 31, 2003. No charge was filed concerning the delay in providing information.

[4] We therefore also need not reach the General Counsel's contention that the Respondent's refusal to pay accrued leave pay was "inherently destructive" of employees' Sec. 7 rights under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

Member Liebman would find that the Respondent's actions violated Sec. 8(a)(3), for the reasons stated by the judge.

which had in previous years been paid to employees at the end of each contract year. The Respondent gave no indication that it was somehow willing to grant vacation leave, even though it was denying sick leave. Moreover, under the circumstances, employees had no reason to believe that the Respondent would respond favorably to requests for accrued vacation pay. Apart from locking its employees out, the Respondent made no communication to them before December 22, 2003, when the Union made its demand for accrued pay. Given the proposition that denials of leave were premised upon the expiration of the contract, we conclude that employees would reasonably believe that it would be futile to seek vacation leave.

We therefore reverse the judge on this issue, and find that the remedy runs to all employees in the unit who had accrued vacation and sick leave at the time of the contract's expiration.

III. WITHHOLDING CERTIFICATION RELEASES

When performing long-distance moves, the Respondent operates in affiliation with another company, North American Van Lines (NAVL). In order to perform long-distance work, drivers employed by the Respondent must be certified by NAVL's parent company, SIRVA. SIRVA-certified drivers who wish to do long-distance work for another company that operates under SIRVA's umbrella must obtain a release from their employer showing that their certifications vis-à-vis that employer have been cancelled. In the instant case, that employer was the Respondent. Respondent's consistently applied policy is to issue such cancellations and releases only to employees who have terminated their employment.

After the lockout began, employees Timothy Johns and John Nagel obtained work with other SIRVA-affiliated companies. The Respondent declined to issue certification releases for Johns and Nagel because they had not terminated their employment with the Respondent. This action was in accordance with the Respondent's past practice of not releasing certifications until the employees who were requesting them had left employment with the Respondent. In an attempt to keep the employees from having to terminate from the Respondent, SIRVA's director of qualifications, Jeff Moore, suggested to the Respondent that it note on the release paperwork that their employment was not being terminated. The Respondent declined this suggestion. For, under its policy, there could be no release in the absence of a termination. SIRVA then suggested that the employees be cross-certified with the companies for which they wanted to work while retaining their certifications with the Respondent. After considering these alternate solutions, the Respondent opted not to vary its past practice of requiring all employees to terminate their employment before obtaining their certification releases.

The judge found that the Respondent's refusal to issue certification releases for Johns and Nagel violated Section 8(a)(3) and (1) of the Act. We disagree. We find that the Respondent established a legitimate reason for its actions.

Even assuming that the General Counsel established a prima facie case under *Wright Line*,[5] we find that the Respondent met its burden of proving that it would have taken the same actions even in the absence of the employees' union activity.

In refusing to provide the releases, the Respondent was acting in accordance with its established policy and past practice, which required that employees terminate their employment before obtaining the releases. The evidence indicates, and the judge found, that the Respondent adhered to this policy before the lockout, with no variation. Therefore, we find that the Respondent was within its rights in adhering to its established company policy after the lockout commenced. The Respondent could have chosen to vary its past practice and adopt the alternative solutions proposed by SIRVA, but it was not required to do so. Our dissenting colleague contends that the Respondent's past practice of conditioning the issuance of certification releases on employees' resigning their employment was not a binding policy. We agree that it was not "binding" in the sense that neither SIRVA nor NAVL imposed the policy on the Respondent. The policy was instituted and maintained by the Respondent. The fact that the policy was not imposed on the Respondent by an outside party does not make it any less legitimate. The issue is whether the Respondent violated the Act by applying this policy in a lockout situation. Our colleague says that the lockout was "an atypical situation." It may well have been. But that does not alter the fact that, in law and in fact, the lockout did not end the employment relationship between the Respondent and these employees. Thus, the Respondent chose to apply its policy to these employees, i.e., an employee cannot work for another SIRVA-affiliated company until his/her employment relationship with the Respondent is terminated.

We disagree with our dissenting colleague's assertion that a "relevant" past practice was not established. Given that the Respondent had never before experienced a lockout, it seems unlikely that it would have devised a policy specifically covering lockouts. Because the Respondent had no specific lockout policy, it chose to apply its established policy governing certification releases to

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

this new situation. We will not find that the Respondent's practice became "irrelevant" merely because it was applied to a novel situation.

Further, there is not a shred of evidence to indicate that the Respondent's policy somehow did not apply to lockout situations. There was no reason to treat locked out employees differently from other employees. Nor was there any reason to treat locked out employees as terminated employees. Indeed, Respondent faced a legitimate concern that by issuing the releases to Johns and Nagel, it would, in effect, be terminating their employment, thereby subjecting itself to potential unfair labor practice charges.

Our dissenting colleague infers that the reason for the Respondent's policy was to prevent its drivers from simultaneously driving for the Respondent and for another employer. There is no evidence to support this inference. The policy is aimed at preventing a person from being an employee of two SIRVA-affiliated companies. As noted above, the employees here remained employees of the Respondent, even during the lockout. The policy, as applied, was consistent with that aim.

Our colleague says that the initial reason for denying the releases (certain log entries had not yet been submitted) was erroneous. Even if erroneous, however, that error could have been intentional or inadvertent. There is no evidence to indicate that it was intentional. We do not agree that this initial incorrect explanation establishes that the real reason for the refusal to provide the releases was pretextual.

We agree that an incorrect reason, and a subsequent change to the correct reason, can in certain circumstances be used to support a prima facie case of discrimination. However, such facts do not themselves prove that the real reason is antiunion motivation.

Further, the second reason for the denial of the releases was accurate: the Respondent's consistently applied and preexisting policy precluded the issuance of the releases unless and until the employees had terminated their employment, and neither Johns nor Nagel had done so. There is no evidence that the Respondent did not, in fact, rely on its policy as the basis for declining to issue the releases. The mere fact that the Respondent previously, and perhaps erroneously, indicated that there were outstanding log entries that the employees had not completed, does not establish that the subsequent policy justification was pretextual.

We also disagree with the assertion that SIRVA official Moore's attempts to resolve the issue somehow obligated the Respondent to alter its policies. Moore is not an employee or representative of the Respondent, and his statements and suggestions have no relevance to the Respondent's policies. As we have stated, the policy relied on by the Respondent was not a SIRVA-imposed policy, but originated with the Respondent. Thus, the Respondent alone is responsible for its interpretation. The fact that SIRVA was willing to support a variation from the Respondent's policy does not compel the Respondent to alter that policy.

Our colleague also relies upon the fact that the Respondent said that the Union would have "real issues" if it gave the employees releases during the lockout. Our colleague says that this was not the Union's position. However, there is no evidence that the Respondent knew that this was not the Union's position. Thus, at most, we have a Respondent misunderstanding of the Union's position, and a misinterpretation of the Union's actions. Similarly, the Respondent thought that employees could not work with nonunion companies and still remain members of the Union. Again, at most, this was a mistaken view. These mistaken views are not evidence of antiunion animus. Further, this is not the primary reason that the Respondent refused to provide the releases. As we have indicated, that reason was the Respondent's established policy and practice.

Finally, our colleague notes that the Respondent ultimately did issue the releases, even without a termination of the employment relationship. However, this was done after the filing of an unfair labor practice charge which essentially challenged the past practice. We would not infer an unlawful motive from an employer's effort to avoid litigation. Further, the Respondent's action essentially gave *better* treatment to locked-out employees than it did to other employees, i.e., it gave them a release even though they were not terminated. Thus, far from being punitive toward these employees, the Respondent was accommodating toward them.

We therefore conclude that the Respondent has met its burden of proving that it would have refused to release the certifications even in the absence of the employees' union activity. Accordingly, we reverse the judge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, University Moving & Storage Co., Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Local 243, International Brotherhood of Teamsters, by unilaterally discontinuing payment of unit employees' accrued vacation and sick leave benefits.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the

rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, all unit employees and former unit employees for the unlawful denial of sick leave benefits by providing them with the sick leave payments they were entitled to under the provisions of the expired contract.

(b) Make whole, with interest, all unit employees and former unit employees for the denial of vacation leave benefits by providing them with the vacation pay that, under the provisions of the expired contract, would have accompanied the employees' use of their accrued vacation leave if the Respondent had not unlawfully denied the use of such leave.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of payments due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Farmington Hills, Michigan, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 31, 2003.

(e) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix, at its own expense, to all employees in the bargaining unit who were employed by the Respondent at its Farmington Hills, Michigan facility as of May 31, 2003. The notice shall be mailed to the last known address of each such employee after being signed by the Respondent's authorized representative.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

Dated, Washington, D.C. June 11, 2007

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The majority erroneously finds that the Respondent acted lawfully when it refused to release Timothy Johns and John Nagel for long-distance driving certification with other employers during the Respondent's lockout.[1] Section 7 protects the right of employees to engage in union activity and to obtain work with other employers during a strike or a lockout.[2] The record clearly establishes that the Respondent's asserted reasons for denying Johns and Nagel a certification release were pretextual and that the denial was unlawfully motivated and violated Section 8(a)(3).

I. MATERIAL FACTS

The Respondent performs local and long-distance moving in affiliation with North American Van Lines (NAVL) and NAVL's parent corporation, SIRVA. Under SIRVA's rules, in order for a driver to perform long-distance (as opposed to local) work for an affiliated employer, the driver must apply for certification by the employer for such work.[3] The employer submits the driver's application to SIRVA for confirmation that the driver has the applicable qualifications. If the driver is

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In all other respects, I agree with the majority opinion.

[2] *Zimmerman Plumbing & Heating*, 339 NLRB 1302, 1304 (2003); *Alaska Pulp*, 326 NLRB 522, 527 (1998), enfd. in relevant part 231 F.3d 1156 (9th Cir. 2000); *Christie Electric*, 284 NLRB 740, 758–759 fn. 52 (1987).

[3] As the judge found, long-distance drivers generally work a greater number of hours than drivers who perform local work and earn a higher rate of pay.

found qualified, the driver is certified by the employer to perform long-distance work. Also under SIRVA's rules, a certified driver who wants to perform long-distance work for another SIRVA-affiliated employer must first obtain a "release" from the current NAVL employer showing that the certification with that employer has been terminated.

On June 2, 2003, the Respondent locked out all of the unit's employees. The lockout continued at least until the hearing in this case in April 2005. Nagel and Johns, who were certified by the Respondent for long-distance driving, both manned the Union's picket line at the Respondent's facility for approximately 2 weeks during the first 3 months of the lockout. Later during the lockout, they both sought work with other moving companies.

A. Johns' Attempt to Obtain a Certification Release

Johns applied to Rose Moving and Storage (Rose), which was affiliated with Allied Van Lines (Allied), another SIRVA company, and was hired on January 5, 2004. On January 29, however, Allied informed Rose that according to the Respondent Johns could not be released because he had not submitted logbook entries for work he had performed on July 23–25 and August 2–4, 2003. Since the Respondent had locked out its employees more than a month before the earliest of these dates, Johns could not have performed any such work. The Respondent never explained why it had inaccurately informed Allied that Johns performed work on those dates.

Having failed to obtain his release, Johns wrote to Jeff Moore, director of qualifications for SIRVA, asking that his certification with the Respondent be cancelled. On January 30, Moore contacted the Respondent on Johns' behalf and suggested that, in view of the ongoing lockout, the Respondent issue a release indicating that Johns' certification was terminated but not his employment. Three days later, Moore contacted the Respondent again to repeat his request. Brad Squires, the Respondent's director of long-distance operations, then responded that "[w]e will only release [Johns] if he . . . resigns his employment." Moore then suggested to Squires that Johns be cross-certified with Allied while retaining his NAVL certification with the Respondent. Squires replied that if the Respondent released Johns without his being terminated "the Union will have real issues with that. . . . For some reason [Johns] wants to work with Allied but wants to stay in the union at [the Respondent]. This can not happen." Moore then gave up trying to obtain a release for Johns.

When the subject of requests for releases came up at a subsequent bargaining session on February 5, the Respondent stated that if Johns wanted to work at another SIRVA company "all he had to do" was resign. The Union took the position that no unit members had resigned and that they all intended to return to work for the Respondent after the lockout ended. On April 2, 2004, the Union filed its first unfair labor practice charge, alleging that since February the Respondent had unlawfully discriminated against unit employees. At a bargaining session on April 16, the Respondent again insisted that a driver had to terminate employment before being issued a release. On May 6, about a month after the Union filed its first charge, the Respondent issued a release to Johns.

B. Nagel's Attempt to Obtain a Certification Release

Nagel's experience was identical to that of Johns. In November 1993, 5 months after the lockout began, he sought long-distance work with Palmer Moving and Storage (Palmer), another SIRVA-affiliated company. After Palmer's long-distance manager, Christina Borowski, had decided to hire Nagel, she was informed that the Respondent refused to issue his certification release. At first Borowski was told that Nagel (like Johns) had not submitted the required logbook entries for work he performed on August 20–21, 2003. As in Johns' case, this purported work was more than 2 months after Nagel had been locked out and therefore could not have been performed by him. In addition, the ALJ credited the testimony of Borowski that she had never seen an employer make an error of this nature.[4] Also as with Johns, the Respondent provided no explanation for its "mistake." On February 10, 2004, Moore informed Squires that SIRVA would not allow Nagel to transfer to Palmer because the Respondent was refusing to issue his release. On June 2—also after the Union filed its discrimination charge—the Respondent issued a release to Nagel. Nagel's release did not state that his employment had been terminated, but simply that he had not worked for the Respondent since June 1, 2003 due to a labor dispute.

II. ANALYSIS

The majority does not dispute that the General Counsel met his initial burden under *Wright Line*[5] of showing that the Respondent's refusal to release Johns and Nagel was motivated at least in part by antiunion animus. The majority also concedes that the Respondent had no "binding" policy preventing it from granting those releases. Nevertheless, the majority finds that the Respondent lawfully "chose" to follow its own purported past practice of withholding releases in all cases except where the re-

[4] Borowski testified that missing log paperwork could result from "only two factors," each in connection with work actually performed: where the driver failed to submit the paperwork or where the driver inserted the wrong date.

[5] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

leased employees resigned. Accordingly, the majority concludes, the Respondent carried its *Wright Line* burden of showing that it would have taken the same actions if Johns and Nagel had not been members of the Union and/or engaged in union activity. For several reasons, each independently sufficient, the majority's conclusion is incorrect.

First, under the circumstances here, the Respondent established no relevant "past practice" whatsoever. The judge did find that SIRVA and NAVL "generally" prohibited certified drivers for one affiliated mover from starting work as a certified driver for another affiliated mover unless employment with the first company "had ended," and that the Respondent's normal practice was consistent with these rules. However, in locking out its employees, the Respondent created an atypical situation, during which there was no risk of employees driving simultaneously for the Respondent and another employer. In this setting, the Respondent's prior application of the policy is irrelevant.

Second, the Respondent initially did not even cite past practice as the basis for withholding the releases. The Respondent instead gave a different reason, which was invalid: that Johns and Nagel had each failed to submit log entries for work that they could not, in fact, have performed. Not only was this claim untrue, but Borowski, Palmer's long-distance manager (a 25-year veteran of the moving industry) confirmed that she had never seen an employer make this sort of error. This is presumably why the Respondent never even proffered a reason for making the two identical "errors" as to these two particular employees.[6] Where an employer's stated reason for taking an adverse action against an employee is pretextual, an inference is justified that the real motive was unlawful.[7]

Third, only when it had become obvious that the Respondent could no longer rely on its false claim that Johns and Nagel were deficient with respect to paperwork did the Respondent switch to the excuse that they were required to resign in order to be eligible for release. A respondent's shifting explanations for taking adverse personnel actions also support an inference of unlawful motivation.[8]

Fourth, the judge—essentially discrediting the Respondent's witnesses—found that the Respondent was not motivated by any past practice. The policy's underlying purpose was to prevent drivers from working for two SIRVA employers at the same time. For this purpose, the discriminatees' employment with the Respondent effectively "had ended" at the start of the lockout—at the Respondent's volition, not theirs—and their certification for work elsewhere for the duration of the lockout would not have resulted in dual employment. Adherence to the Respondent's past practice, then, made no business sense—which supports a finding of unlawful motive.

In addition, Moore, the official directly responsible for enforcing SIRVA's certification requirements, confirmed by his suggestions that the discriminatees were not required to resign and that the Respondent could issue their releases without terminating their employment. The Respondent itself confirmed this by ultimately issuing the releases to both employees without requiring them to resign.

Finally, the Respondent's own communications on the subject of the releases further confirm that its real motivation was antiunion animus. The Respondent had no basis whatsoever for telling Moore that "the Union will have real issues" if it granted a release for Johns to obtain work with other employers during the lockout.[9] On the contrary, the Union's actions clearly showed that it wanted the releases issued. Nor was there any impropriety, as Squires implied to Moore, in Johns' "want[ing] to work with Allied but want[ing] to stay in the Union at [the Respondent]." As a matter of law, once the lockout ended Johns was entitled to return to work for the Respondent with his union status intact.

Despite the fact that the Respondent established no relevant past practice supporting its refusal to provide certification releases and based its refusal on a pretextual reason, the majority concludes that the Respondent met its *Wright Line* rebuttal burden of demonstrating that it would have refused to provide releases even in the absence of its union animus. In reaching this conclusion, the majority concocts various defenses for the Respondent and distorts the *Wright Line* framework. The record

[6] Contrary to the majority, because the General Counsel had met his initial *Wright Line* burden, it was the Respondent's burden to show that these "errors" were inadvertent and not further proof of unlawful motive.

[7] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Smucker Co.,* 341 NLRB 35, 40 (2004); *Loudon Steel*, 340 NLRB 307, 312 (2003).

[8] *Commercial Erectors, Inc.,* 342 NLRB 940, 943–944 (2004); *Richard Mellow Electrical Contractors*, 327 NLRB 1112, 1115 fn. 18 (1999); *Martel Construction*, 302 NLRB 522, 530 fn. 18 (1991), enfd. 35 F.3d 571 (9th Cir. 1994).

[9] Contrary to the majority, it was not the General Counsel's burden to show that the Respondent "knew that this was not the Union's position." It was rather the Respondent's burden to show that it had some credible basis for its purported "misunderstanding." As a practical matter, the "legitimate concern" the majority attributes to the Respondent of facing an unfair labor practice charge for unlawful termination if it complied with Johns' and Nagel's own *requests* for releases is not only factually unsupported but also nonsensical.

establishes that the Respondent withheld the discriminatees' certification releases because they engaged in union activity. I therefore agree with the judge that its actions violated Section 8(a)(3).

Dated, Washington, D.C. June 11, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Local 243, International Brotherhood of Teamsters, by unilaterally discontinuing payment of your accrued vacation and sick leave benefits.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL make whole, with interest, all unit employees and former unit employees for the unlawful denial of sick leave benefits by providing them with the sick leave payments they were entitled to under the provisions of the expired contract.

WE WILL make whole, with interest, all unit employees and former unit employees for the denial of vacation leave benefits by providing them with the vacation pay that, under the provisions of the expired contract, would have accompanied the employees' use of their accrued vacation leave if we had not unlawfully denied the use of such leave.

UNIVERSITY MOVING & STORAGE CO.

Joseph P. Canfield, Esq. and *Jennifer Y. Brazeal, Esq.,* for the General Counsel.

James B. Perry, Esq. and *Jack VanHoorelbeke, Esq. (Dickinson Wright),* of Detroit, Michigan, for the Respondent.

Thomas Weldon, of Plymouth Township, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on April 26 and 27, 2005. Local 243, International Brotherhood of Teamsters, AFL–CIO (the Charging Party or the Union), filed the initial charge on April 2, 2004, and amended that charge on May 17, 2004. The Union filed a second charge on August 6, 2004, and amended that charge on September 29, 2004. The Regional Director of Region 7 of the National Labor Relations Board issued the consolidated amended complaint on September 30, 2004. The complaint alleges that University Moving & Storage Co. (the Respondent or the Company) violated Section 8(a)(3) and (1) and Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to pay unit employees their accrued vacation pay and sick pay during a lockout. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to release information regarding two employees that was necessary in order for those employees to obtain certain other work during the lockout. The Respondent filed an answer in which it denied that it had committed any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law

FINDINGS OF FACT

I. JURISDICTION

The Respondent has an office and place of business in Farmington Hills, Michigan, and is in the business of providing local and long distance relocation services to customers both in and outside the State of Michigan. During a representative year, the Respondent purchased and received at its Farmington Hills facility goods valued in excess of $50,000 directly from points outside of the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

In addition, the Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a moving and storage company. It transports goods locally, long distance, and internationally. The allegations in this case concern the Respondent's facility in Farmington Hills, Michigan (the facility), one of its five locations. Since at least June 1, 1997, the Union has been the designated exclusive collective-bargaining representative of a unit of employees at the facility. There are approximately 18 employees in that bargaining unit, which is defined to include

local drivers, local helpers, long-distance drivers, long-distance helpers, warehousemen, packers and craters. The most recent collective-bargaining agreement between the parties went into effect on June 1, 2000, and expired on May 31, 2003.

On June 2, 2003, the first workday following the expiration of the contract, the Respondent initiated a lockout of all unit employees. That lockout was continuing at the time of trial in April 2005.[1] In response to the lockout, the Union maintained a picket line at the facility for approximately 3 months. John Nagel, one of the alleged discriminatees, participated in the picket line for much of that time. Timothy Johns, another alleged discriminatee, participated in the picket line for approximately 2 weeks.

After initiating the lockout, the Respondent denied employees accrued sick leave and paid vacation benefits that those employees had earned through prelockout work. The Respondent also refused to issue certification releases that Johns and Nagel needed in order to qualify for work they were seeking with other employers.

B. Sick Leave and Vacation Benefits

1. Contract provisions

The collective-bargaining agreement that expired on May 31, 2003, provided unit employees with both sick leave and vacation benefits. The sick leave provision in the expired contract provides in relevant part:

> The employer shall provide employees with one (1) year or more of seniority, five (5) days sick leave in each contract year. Employees must work sixty percent (60%) of the previous contract year to be entitled to all five (5) sick days in the subsequent contract year. Employees who do not achieve the sixty-percent (60%) shall be entitled to sick days on a pro-rata basis. . . . Employees off due to occupational illness or injury shall have such time included as time worked only to the extent of days missed in the contract year in which the above occurred, provided such employee would have otherwise worked.
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> * * *
>
> Unused sick leave pay shall be paid to the employee at the end of each contract year and shall not be accumulated from year to year.
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> Newly hired employees shall receive a pro-rata share of sick leave pay based upon the number of months remaining between the date of the employee's one (1) year anniversary of employment and May 31 of the applicable contract year.

General Counsel's Exhibit 3 at pages 31–32. Under this sick leave provision, qualifying employees acquire a new allotment of sick days on the first day of each contract year—i.e., on June 1. If an employee has any unused sick leave at the end of the contract year—i.e., on May 31—that sick leave does not carryover to the next year, but the employee receives a payout for the unused days.

[1] The complaint does not allege that the lockout was unlawful and the General Counsel stipulated at trial that the legality of the lockout was not an issue in this proceeding. GC Exh. 1(n); Tr. 337–339.

The contract sections regarding vacation leave provide in relevant part:

> Section 1. All employees must have been in the employ of the Employer for twelve (12) consecutive months and must have worked seventy-five percent (75%) of the total working days of said period in order to obtain any vacation. During the second and subsequent years, the man must have actually worked sixty-percent (60%) of the total working days of the year, but need not be employed for the full year to be eligible for the vacation.
>
> Section 2. Vacation pay shall be as follows:
>
> One (1) year employment . . . . . One (1) week
> Three (3) years employment. . . . . Two (2) weeks
> Ten (10) years employment . . . . . Three (3) weeks
> Fifteen (15) years employment. . . Four (4) weeks
> Twenty-five (25) years of . . . . . .Five (5) weeks
> employment
>
> Compensation for each of the first two (2) weeks of vacation shall be computed at forty-five (45) times the then prevailing straight time hourly rate.
>
> Section 3. All vacations earned must be taken by employees and no employee shall be entitled to vacation pay in lieu of vacation. Employees who have not actually worked sixty percent (60%) of the total working days of the year but who have completed one (1) year of seniority, shall receive vacation on a pro-rata basis. This pro-rata entitlement shall also include employees who have quit, been discharged, or laid-off before they have worked their sixty-percent (60%); provided he has worked his first full year.
>
> Section 4. Employee, upon the giving of a reasonable notice of not less than one (1) week to his employer, shall be given his vacation pay before starting on his earned vacation.
>
> Section 5. Vacation pay shall be paid and may be taken only after expiration of twelve (12) consecutive months from the employee's anniversary date. Vacations may be taken at any time of the year; provided, however, that only twenty percent (20%) of the employees in each classification shall be off at any one time unless otherwise mutually agreed. Where more than twenty (20) percent of the employees in each classification request vacation at the same time, seniority shall prevail.
>
> Section 6. An employee who is on worker's compensation shall have the time spent on worker's compensation counted as days worked for purposes of earning a vacation entitlement; provided, however, the employee would have been scheduled to work. . . . By anniversary year, it is understood and agreed that the parties mean the time period from the anniversary date of any employees' hire by the Employer until one year therefrom. An employee on worker's compensation shall not have his time so spent counted as days worked in any anniversary year other than the year in which the injury occurs.

GC Exhibit 3 at pages 13–14. Under these provisions, the vacation benefit does not accrue on the anniversary of the con-

tract's effective date, as is the case with sick leave, but rather on a date that varies from employee-to-employee based on the individual's hire date. Also unlike the sick leave entitlement, if an employee does not use his or her allotment of vacation days during the 12 months after it is awarded, the unused vacation days expire without a payout. The contract states that the Respondent will dispense vacation pay to employees who use accrued vacation leave, and describes how such vacation pay will be calculated.

For both sick leave and paid vacation leave, an employee must have at least 1 year of seniority in order to qualify for leave. To accrue the full allotment of leave the employee generally must work at least 60 percent of working days during the 1-year period at-issue, but if an employee works less than that percentage, he or she receives leave on a prorata basis. The exception is that during the first year of an individual's employment he or she must work at least 75 percent of working days in order to qualify for any vacation leave at all.

2. Respondent denies already-earned sick leave and paid vacation leave to locked-out employees

Under the above provisions, the unit employees were entitled to be paid for any sick leave that they had accrued, but not used, during the contract year ending on May 31, 2003. Five of the unit employees had accrued sick leave remaining at that time—between 1 and 3 days each. Under the contract, unit employees also accrued a new allotment of sick days on June 1, 2003, based on their work during the previous 12 months.[2] Employees with 1 year or more of seniority, who had worked at least 60 percent of working days during that period, received a new allotment of 5 sick days on June 1, 2003. Those who worked less than 60 percent of the time received a prorata allotment of the usual 5 sick days. On June 1, 2004, employees were entitled to a payout for the unused portion of that allotment.

As of May 31, 2003, 15 of the unit employees had accrued, but unused, vacation days. The number of unused vacation days remaining for individual employees ranged from as few as 2 to as many as 21. Qualifying employees also received a new allotment of vacation leave at their first anniversary date following the institution of the lockout. The maximum amount of vacation an employee can earn under the contract is 5 weeks, and the actual number an employee accrues depends on the number of years the employee has worked for the Respondent and the percentage of days he or she worked during the 12-month period leading up to the anniversary of his or her hire date.[3]

The Respondent has denied the above-described sick leave and paid vacation benefits to employees since the start of the lockout.

3. The Company's response's to union and employee inquiries about accrued sick and vacation leave

In 2003 and 2004, the Union and the Respondent had multiple bargaining sessions for a new contract. Among the union representatives who attended these meetings were: Thomas Weldon (union business agent and vice president of the local), Douglas Robinson (union business agent), and Kevin Earl (union steward). The Respondent's representatives included Patricia Peterson (director of employee services) and James B. Perry (counsel for the Respondent).[4] At a session on December 22, 2003, Weldon stated that a number of employees had told him that they had not received vacation and sick leave pay they were owed. Peterson stated that there was "no contract in place." Weldon asked the Respondent to provide information on the vacation time that was still available to all employees. He requested this information in order to determine how much accrued leave the employees still had so that the benefit could be used. Perry agreed that the Respondent would check its records, chart the information, and mail it to Weldon by mid-January. January passed, and the Respondent did not provide the information. The parties had a meeting on February 5, 2004, at which Weldon again asked for the information. Peterson stated that she had not brought the information to the meeting. Weldon asked the Respondent for information showing the vacation "left for all employees," and Peterson agreed to provide the information.

In a letter dated March 1, 2004, from Peterson to Weldon, Peterson did not provide the leave information, but did state a position regarding the question of employee vacation benefits. Peterson stated that employees were only entitled to "paid vacation time" during the term of the collective-bargaining agreement, and since the contract had expired on May 31, 2003, the Respondent did not believe the vacation provisions were in effect and "d[id] not see how any of the bargaining unit employees would be entitled to vacation pay." Peterson further stated that "even if the vacation provisions in [the contract] somehow continued beyond the contract's May 31, 2003 expiration date, we do not feel that those provisions entitle any of the bargaining unit employees to any vacation pay," since the contract states that employees are not entitled to take vacation pay in lieu of vacation. Peterson offered to discuss the matter during the parties' next collective-bargaining session. The letter made no explicit mention of sick leave. In one of their meetings, Peterson told union officials that the Respondent's practice was to pay employees who resigned from their positions for any accrued sick leave and vacation leave they had left, but the Union maintained that all of the employees planned

[2] As discussed in the analysis section below, the terms relating to sick leave and vacation benefits remained in effect after the contract expired on May 31, 2003.

[3] The contract provides that employees do not qualify for the 5-weeks maximum vacation benefit until they have worked for the Respondent for 25 years. The record indicates that none of the employees met the 25-year requirement. The most that any employee actually may be eligible for is the 4-weeks paid vacation leave available to those with 15 or more years of seniority.

[4] Weldon, Peterson, and Perry also attended the trial: Weldon as a representative of the Union and a witness for the General Counsel; Peterson as a representative of the Respondent and a witness for the Respondent; and, Perry as trial counsel for the Respondent.

to return to work with the Respondent when the lockout concluded.[5]

As of the time of a bargaining session on April 16, 2004, the Company had not yet responded to the information request, and at that meeting Weldon asked whether the Respondent had the information on vacation entitlement. Perry answered that the Respondent did not believe that the employees had "anything coming," but that it could provide information on how much leave individuals had actually taken. The parties agreed on a form that the Respondent would use to report the vacation days and the sick leave days that each employee actually had taken as of May 31, 2003.[6] The Respondent was also to indicate each employee's hire date on the form. At that meeting, and at subsequent ones, Perry offered to discuss the issues regarding vacation and sick leave as part of the negotiations for a new contract, but Weldon declined to address the questions relating to the already-owed benefits in that context. By letter dated May 19, 2004, Peterson transmitted the completed vacation/sick leave form to Weldon. Using the information on that form, Weldon calculated the amount of unused vacation leave and sick leave each employee had as of May 31, 2003. Fifteen of the 18 unit members were owed paid vacation days, ranging in number from 2 to 21 days each. Five of the employees were owed sick leave—between 1 and 3 days each. As a group, the bargaining unit was owed a total of 132 paid vacation days and 8 sick leave days as of May 31, 2003. This does not take into account the new allotment of sick leave that employees accrued on June 1, 2003, or the new vacation leave that each employee accrued on his or her next anniversary date based on pre-lockout service.

Johns believed he was entitled to both vacation and sick days, and in April 2004 he sent a letter to the Respondent asking to be provided with those benefits. By letter dated April 22, 2004, Peterson responded that she had received the request, but said that "We do not believe that any vacation pay is owed to you and I must deny this request for pay." Similarly, Earl sent a letter to Peterson requesting vacation and/or sick pay. By letter dated April 22, 2004, Peterson replied "We do not believe that any vacation pay is owed you and I must deny this request for pay."

C. Certification Releases for Johns and Nagel

1. Driver certification

The Respondent operates as an independent entity when performing local moves, but when performing long-distance moves[7] it operates in affiliation with another company, North American Van Lines (NAVL). Not all of the Respondent's drivers are authorized to perform the NAVL-affiliated/long-distance work. A driver seeking certification to perform such work must first submit an application to the Respondent, which the Respondent then transmits to NAVL for a determination as to whether the individual meets applicable guidelines. If NAVL and/or its parent corporation, SIRVA,[8] conclude that the driver qualifies, then NAVL issues a safety number to the driver, which establishes that the driver is certified to perform NAVL-affiliated work while employed by the Respondent. The driver uses that safety number when performing long-distance work for the Respondent or any other moving company affiliated with NAVL or another SIRVA-owned van line. Long-distance drivers have the opportunity to work a greater number of hours than do drivers who perform local work exclusively. As a general matter, the pay for long distance work is higher than for local work.

Under the rules of SIRVA, if one of the Respondent's NAVL-certified drivers wants to obtain work doing long distance moves for another company that operates under SIRVA's umbrella, that driver must first obtain a release from the Respondent showing that his or her NAVL certification with the Respondent has been cancelled and that any outstanding issues with the Respondent regarding such things as money owed or

[5] Peterson gave testimony in which she arguably represented that, as early as the December 22 meeting, the Respondent had informed the Union that the Company's position was that there was no vacation or sick pay owed. To the extent that this is what Peterson claimed, I do not credit her testimony. Her version is uncorroborated and is contrary to the testimony of Weldon and Robinson, both of whose testimony on this subject is consistent with the existing contemporaneous notes they made of the meetings. Moreover, Peterson's testimony is undercut by the fact that the Respondent agreed on both December 22 and February 5 to provide the Union with information on what leave the employees still had. If the Respondent had already announced the position that the employees had no entitlement to vacation leave, it would be unlikely to agree to provide information showing what vacation leave the employees still possessed. Peterson's testimony is also undermined by the March 1, 2003, letter. In that letter, Peterson sets forth the Respondent's position that the employees have no vacation leave entitlement, but never claims or suggests that this position had been communicated previously to Weldon or anyone else associated with the employees or the Union. The letter simply announces the position—it does not, on its face, confirm or recapitulate a stance that the Respondent had already taken. Based on my observation of the demeanor of the witnesses, and the record as a whole, I do not credit Peterson's testimony to the extent that she claims the Respondent notified the Union of its position regarding vacation and sick leave prior to March 1.

[6] Weldon and Robinson testified that at meetings on December 22, 2003, and on February 5, 2004, Weldon had asked the Respondent to provide information showing how much leave had been used by employees, as well as how much employees were owed. Tr. 58–60, 61–62, 185–187. Peterson, on the other hand, testified that on those dates the Union was seeking information on what employees were entitled to, and had not requested information on what employees had actually used. Tr. 296–297. Based on my assessment of the demeanor and testimony of the witnesses, and after considering the contemporaneous notes made by Weldon and Robinson, GC Exhs. 8 and 9, I conclude that on December 22 and February 5, Weldon asked the Respondent to supply information regarding what vacation employees "had left" and what employees "still had coming," but did not specifically ask for a breakdown showing how much leave the employees had actually taken. On both December 22 and February 5, the Respondent responded to Weldon's information request by stating that it would provide the information. The Respondent did not, until later, take the position that the employees had no present entitlement to leave, but that the Company could provide information on what leave employees had used.

[7] "Long distance work" is defined under the expired contract as "all work beyond eighty-five (85) miles by road mileage one way . . . computed from the City County Building located in the City of Detroit." GC Exh. 3, p. 5.

[8] The record indicates that all the letters in the word "SIRVA" are to be capitalized, but not whether SIRVA is an acronym, or, if so, what the acronym stands for.

missing paperwork have been resolved. The record shows that there are at least three long distance van lines under the SIRVA umbrella—NAVL, Global Van Lines, and Allied Van Lines. A certified driver with a moving company affiliated with any one of the SIRVA-owned van lines cannot begin doing long distance work for any other mover affiliated with one of those van lines unless the first moving company issues a written certification release. SIRVA's certification release policy applies only to long-distance work, and only between movers that are under the SIRVA umbrella.[9] Since well before the lockout, the Respondent's practice was not to release a driver until that driver's employment with the Respondent was terminated.

2. Johns and Nagel denied work after Respondent refuses to release them from certification

When the Respondent locked out the unit employees, a number sought work with other moving companies. Those who did included Johns and Nagel. Johns, a certified driver, applied for a position with Rose Moving and Storage (Rose), and was hired on January 5, 2004. For purposes of long-distance work, Rose is affiliated with Allied Van Lines (Allied), a SIRVA company, and therefore Johns could not become certified to perform long-distance work with Rose unless the Respondent first issued a written certification release. Johns submitted an application for Allied certification. On January 29, 2004, Allied informed Rose that before Johns could be certified he had to complete missing logbook entries for work performed on behalf of the Respondent on July 23–25, and August 2–4, 2003. Johns, however, had been locked-out by the Respondent on those dates and therefore had not performed any work that could be entered in his logbook. At any rate, in an effort to address this obstacle to certification with Allied, Johns submitted logbook entries noting that he was off duty on the dates in question. The Respondent did not provide an explanation as to why it had erroneously reported that Johns performed work on dates during the lockout.

On January 29 or 30, Johns tried to advance his effort to become Allied-certified with Rose by submitting a letter to Jeff Moore, the Director of Qualifications for SIRVA, in which he asked that his prior certification be cancelled even though he was not resigning his position with the Respondent. Moore, in turn, contacted Peterson (the Respondent's director of employee services) on January 30, to inform her about Johns' request and ask her to complete the necessary certification release so that Johns could become Allied-certified. Moore suggested that Peterson address any concerns she had about releasing Johns from his certification during the ongoing lockout by noting in the paperwork that the Respondent was only releasing Johns' certification, not terminating his employment. Three days later, on February 2, Moore contacted Peterson and Brad Squires, the Respondent's director of long-distance operations,[10] to again ask that the Respondent complete the necessary release paperwork so that Johns could become certified with Allied Van Lines. Later that day, Squires responded on behalf of both Peterson and himself, stating "We will only release [Johns] if he goes into our Farmington Hills office and resigns his employment." Moore did not give up, but suggested another solution—that Johns be cross-certified with Allied while retaining his NAVL certification with the Respondent. The same day, Squires rejected that solution as well. He wrote to Moore:

> I don't think that will work. If we allow [Johns] to go somewhere else without terminating with us the union will have real issues with that. If Allied wants to put him on, Allied should instruck (sic) him to terminate with University and we will all move forward from there. For some reason the employee wants to work with Allied but wants to stay in the union at [the Respondent]. This can not happen. Please have him terminate and then qualify with Allied.

On February 10, Moore sent an e-mail communication to Squires from which it is apparent that Moore had given up trying to convince the Respondent to agree to issue a certification release for Johns. Moore stated that a written release was required by SIRVA's corporate transfer policy and that SIRVA would reject Johns' request to transfer since the Respondent was unwilling to provide the release.

Johns never personally contacted the Respondent to ask that he be released to work with Rose. However, the subject of the certification release sought by Johns was discussed during contract negotiations. At the February 5 bargaining session, counsel for the Respondent repeatedly told the union representatives that if Johns wanted to work at another company "all he had to do" was resign. The Respondent's counsel also asked Weldon to inform employees that the releases would be issued if they resigned. During negotiations the union representatives consistently took the position that none of the unit members had resigned and that all of them intended to return to work for the Respondent once the lockout ended. At a bargaining session on April 16, counsel for the Respondent stated that it was his understanding that drivers had to terminate their employment before the Respondent would issue a release, and he asked whether Weldon had a different understanding. By this time the Respondent's failure to execute a release for Johns was the subject of an unfair labor practices charge, and Weldon refused to discuss it in the context of negotiations over the terms and conditions for a new contract.

On May 6, over 5 months after Moore first requested that the Respondent release Johns from his certification, and approximately 1 month after the Union filed an unfair labor practices charge regarding the matter, the Respondent issued the paperwork releasing Johns from his certification and enabling him to perform certified work with Rose.

Nagel was another certified driver with the Respondent. After being locked out by the Respondent, Nagel sought to become a certified driver with Palmer Moving and Storage (Palmer)—another SIRVA-affiliated company, but he encountered roadblocks similar to those experienced by Johns. Palmer's long-distance manager, Christina Borowski, had de-

[9] The record does not reveal how many moving companies there are in the Respondent's region that perform long-distance work, but which are not affiliated with SIRVA.

[10] The complaint alleges, and the Respondent admits, that Peterson and Squires are agents of the company.

cided to hire Nagel as a certified driver, but was informed that the Respondent refused to execute the necessary release paperwork. At first Borowski was told, on December 2, 2003, that the problem was that Nagel had not submitted the required logbook entries for goods he transported for the Respondent on August 20–21, 2003. As with Johns, Nagel was locked out on the dates in question and therefore had not performed work for which logbook entries were required. The Respondent did not provide an explanation for this error and Borowski, a 25-year veteran of the moving industry, testified that she had never before seen a company demand logbook entries from a driver because work had been erroneously attributed to that driver.

The Respondent had not issued the release paperwork for Nagel as of February 10, and on that date Moore informed Squires that SIRVA would not allow Nagel to transfer to Palmer since the Respondent was refusing to provide the release. In late April or early May, a union official first found out about Nagel's problems getting released from his certification.

On June 2, 2004, the Respondent issued the paperwork releasing Nagel to perform certified work with another SIRVA-affiliated company. In that paperwork, the Respondent did not state that Nagel's employment had been terminated, but simply reported that since June 1, 2003, Nagel had not worked for the company due to a labor dispute. By the time the Respondent issued the release, Nagel no longer needed it, since he had found employment as a certified driver with a non-SIRVA moving company. Nagel never contacted the Respondent directly to ask that it release him to work for another SIRVA-affiliated moving company.

D. Charge Filings

The Respondent contends that the allegations regarding the denial of vacation and sick leave are time barred under Section 10(b), an argument that necessitates a review of the charge filings underlying the complaint.[11] The record shows that the Union filed the first unfair labor practices charge involved in this case on April 2, 2004. That charge alleged that "[s]ince on or about February 2004, the above-mentioned Employer through its officers, agents and/or representatives have discriminated against employees because of their union activities." The following May 17, the Union clarified its allegation by amending the initial charge to read: "Since about January 5, 2004, the above referenced Employer through its officers, agents and/or representatives has discriminated against employee Timothy A. Johns by failing to release information because of his union activities." The Union filed a second charge on August 6, 2004. That charge alleges, inter alia, that the Respondent discriminated against Nagel by failing to release information, and that "[s]ince on or about March 1, 2004," the Respondent had "refused to pay employees vacation monies owed under the contract." On September 29, 2004, the Union amended the charge allegation regarding outstanding leave to claim that sick leave benefits, as well as the vacation benefits, had been withheld. The amended allegation regarding leave reads, "Since on or about March 1, 2004, the above referenced Employer through its officers, agents and representatives have refused to pay employees vacation and sick pay monies owed under the contract."

E. Complaint Allegations

The complaint alleges that the Respondent's refusal to provide unit employees with vacation and sick pay owed under the expired contract is discriminatory in violation of Section 8(a)(3) and (1) of the Act, and a failure to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to release information regarding Johns' and Nagel's employment with the Respondent that was necessary for those individuals to obtain certain other work during the ongoing lockout.

Analysis

1. Motion to dismiss or defer allegations regarding denial of leave

At the start of trial, the Respondent presented a motion to dismiss the complaint claims regarding vacation and sick leave benefits as untimely under Section 10(b), or, in the event that I did not dismiss those claims, to defer them to the grievance and arbitration procedures of the expired contract.[12] Previously, the Respondent had petitioned the Regional Director of Region 7 of the Board to defer the claims regarding vacation and sick leave. The Regional Director denied that petition as well as the Respondent's subsequent request for reconsideration. At trial, I took the Respondent's motion under advisement. For the reasons discussed below, I now deny the Respondent's motion.

a. Timeliness

Section 10(b) of the Act, states in relevant part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The 10(b) period begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). Notice, "whether actual or constructive, must be clear and unequivocal." *Salem Electric Co.,* 331 NLRB 1575, 1576 (2000); see also *Patsy Trucking,* 297 NLRB 860, 862 (1990) (notice to charging party whether actual or constructive must be "clear and unambiguous" to trigger 10(b) period). The party asserting the 10(b) defense bears the burden of showing such notice. *Salem Electric Co.,* 331 NLRB at 1576; *Carrier Corp.*, 319 NLRB 184, 190 (1995); *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995).

In this case, the first charge that mentioned the denial of vacation leave was filed on August 6, 2004. That was well within the 6-month filing period that began on March 1, 2004—the date of Peterson's letter announcing the Respondent's position that unit employees had no existing entitlement to "paid vaca-

[11] I may have inadvertently failed to receive GC Exh. 1 (formal papers) into evidence during the trial. I hereby receive GC Exh. 1 into evidence.

[12] The petition does not seek dismissal or deferral of the complaint allegation that the Respondent unlawfully refused to release information regarding Johns and Nagel. ALJ Exh. 1 at p. 6.

tion time" and "vacation pay." The Respondent has not shown that the Union or employees had notice prior to March 1 of the Respondent's intent to deny vacation benefits to the locked-out employees. Before March 1, the Respondent had not only failed to inform the Union that it would refuse to pay accrued vacation benefits to the locked-out employees, but had twice promised to provide the information that the Union was seeking in order to calculate how much leave each employee had left. Peterson's statement on December 22 that there was "no contract in place," did not constitute "clear and unequivocal" notice that the Respondent would later deny vacation benefits to the locked out employees. At best that statement was cryptic, and any hint that it contained of the position that the Respondent later took was dispelled by the subsequent assurances Perry and Peterson both gave that they would provide the Union with the information relating to each employee's vacation leave. Those assurances certainly suggested that the Respondent was not foreclosing the possibility that it would provide the vacation benefit once the paperwork was sorted out showing how much unused vacation leave each employee possessed.

The Respondent argues that the Union and employees had notice that a possible unfair labor practice had been committed when the Respondent did not provide vacation pay on, or shortly after, June 1, 2003—the first day after the end of the previous contract year. However, the June 1 date is not an especially significant one with respect to vacation leave, since the accrual and expiration of vacation leave is not tied to contract years, but rather to the anniversary date of the particular employee's hiring. Under the contract, the employees' vacation pay was not due until at least 1 week after the employee requested it. The record shows that the Union began to seek the leave benefits on behalf of employees on December 22, 2003, but the Respondent stalled that inquiry by repeatedly promising to provide the necessary information and then failing to do so. Despite the Union's efforts to discover the status of the employees' vacation leave allotments, the Respondent did not reveal that it would withhold the benefit until the March 1 letter. In addition, the record does not show that any individual employee had requested that the benefit be paid until Johns and Earl made their requests in about April 2004—after the Respondent's March 1 announcement. I conclude that the evidence does not show that, at any time prior to the March 1, 2004 letter, the Respondent gave either actual or constructive notice of its intent to deny vacation benefits to the locked-out employees. Therefore, the complaint allegation that the Respondent unlawfully denied vacation benefits to the locked-out employees is not time barred.

The Respondent has also failed to show that the charge regarding sick leave was untimely. The 6-month period should be calculated in this instance on the basis of the timely charge filed on August 6, 2004, not the September 29, 2004 amendment to that charge which first mentioned sick leave. Although the relevant portion of the August 6 charge referred to unlawful denial of the vacation leave benefit, not sick leave, I conclude that the sick leave allegation was sufficiently related to the August 6 allegation to make it appropriate to refer back to that earlier charge for purposes of determining timeliness. As the Board has held, allegations that involve events occurring more than 6 months prior to the filing of the charge are still considered timely if those allegations are "closely related" to the allegations made in a timely charge. *Seton Co.*, 332 NLRB 979, 982–983 (2000); *Nickles Bakery of Indiana,* 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1116–1118 (1988); see also *Ross Stores, Inc.*, 329 NLRB 573, 573 fn. 6 (1999), enf. denied in part 235 F.3d 669 (D.C. Cir. 2001) (the "closely related" standard applies both when the question is whether otherwise time-barred allegations in an amended charge relate back to the allegations of an earlier timely filed charge, and where the question is whether the allegations in a complaint are sufficiently related to those in a charge.).

To determine if allegations are closely related, the Board considers: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances; and (3) whether the respondent would raise similar defenses to the allegations. *Nickles Bakery*, 296 NLRB at 928; see also *Redd-I, Inc.*, 290 NLRB at 1118.[13] In this case, the allegation regarding the sick leave benefit is based on the same legal theories as the allegation regarding the vacation benefit—i.e., that the denial of the benefit during the lockout was inherently destructive of Section 7 rights and discriminatory in violation of Section 8(a)(3) and (1), and also violated the Respondent's obligation to bargain in good faith under Section 8(a)(5) and (1). Factually, both allegations revolve around the same circumstances—i.e., the lockout, the Union's requests for information regarding outstanding leave, the Respondent's delay in providing that information, and its eventual refusal to provide the unused leave benefits. For the most part the Respondent's defenses are also the same—e.g., the benefits did not survive the contract expiration, there is no showing of anti-union animus, and the Respondent has offered to bargain over the issues involving unused vacation and sick leave. For these reasons, I conclude that the allegations regarding sick leave are closely related to those regarding vacation and that the sick leave claim is timely as long as the Union or employees did not have notice of the Respondent's denial of the benefit more than 6 months prior to the August 6 charge—that is, prior to February 6, 2004.

In this instance, the Respondent has not shown that, prior to February 6, it gave the Union or employees actual notice that the Company was refusing to provide employees with their accrued sick leave benefits.[14] The closer question is whether the Respondent has shown that the Union had "constructive" notice prior to February 6. The Respondent contends that since employees were entitled to be paid for any unused sick leave

[13] The Board has treated these as factors to guide analysis of the issue, not as *requirements* all of which must be met. See, e.g., *Nickles Bakery*, 296 NLRB at 928; *Redd-I*, 290 NLRB at 1116.

[14] Indeed, it is not clear from the record that the Respondent *ever* made such an announcement prior to the relevant charge filing. In her March 1, 2004 letter, Peterson stated that employees were not entitled to vacation leave, but did not mention sick leave. Later in April 2004, when Johns and Earl made requests for vacation and sick leave benefits, Peterson chose to address only the vacation leave question, and not the related issues involving sick leave. Thus it may well be that the sick leave claim is timely even if the 10(b) period is calculated based on the charge amendment the Union filed on September 29, 2004.

they had on May 31, 2003—at the end of the contract year—the Union should have known that the Respondent was denying the benefit when it did not make the payments on June 1 or shortly thereafter. I have considered this argument, but conclude that the record evidence is insufficient to show constructive notice that is "clear and unequivocal." First, although the employees were contractually entitled to the sick leave payout at the end of the contract year, the Respondent did not show that the company's prior practice was to pay those benefits on that date or soon thereafter. Nor did the Respondent show that the payment was made automatically, rather than when the employee requested it. Assuming that employees were required to request the payout, the record does not show that they could follow the established procedures for making such requests at a time when the Respondent would not permit them to enter its offices. Moreover, I would expect that the lockout, and the absence of regular paydays during that period, created some confusion about how the company would handle the logistics of making any remaining payments to which employees were entitled. On this record, it would be unfair to conclude that the Union or employees should have grasped that the Respondent never intended to make the required payouts for accrued sick leave, simply because the Respondent did not make those payouts promptly at the end of the contract year. Given the gaps in the picture provided by the record in this case, it cannot be said that the Union or employees had the requisite "clear and unequivocal" notice of the denial of the sick leave benefit when the Respondent failed to make those payments at the end of the contract year or shortly thereafter or at any other time prior to February 6. As the party arguing for dismissal on timeliness grounds, the Respondent bears the burden of proof on the question of whether there was "clear and unequivocal" constructive notice more than 6 months before the charge, and it has failed to meet that burden here.

I conclude that the evidence does not show that, at any time beyond the charge filing period relevant to the vacation and sick leave allegations, the Union or employees had either actual or constructive notice of the Respondent's intent to deny those benefits to the locked-out employees. Therefore, the complaint allegation that the Respondent unlawfully denied the vacation and sick leave benefits to the locked-out employees is not time barred, and the motion to dismiss based on Section 10(b) is denied.

b. Deferral

The Respondent argues that the allegations regarding accrued leave, if not dismissed, should be deferred to the contractual grievance and arbitration procedures. Under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), deferral is appropriate when the following factors are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution. *Wonder Bread*, 343 NLRB 55, 55 (2004); see also *United Technologies*, 268 NLRB at 558.

In this case, the vacation and sick leave issues presented are not "eminently well suited" to resolution through arbitration. Deferral to arbitration is not appropriate when, although contract provisions are involved in a dispute, those provisions are clear and unambiguous and do not present problems that require the special competence of an arbitrator. See *New Mexico Symphony Orchestra*, 335 NLRB 896, 897 (2001), and *R.T. Jones Lumber Co.*, 313 NLRB 726, 727 (1994); see also *Clarkson Industries*, 312 NLRB 349, 351 (1993) (a case is eminently well suited to arbitration when "the contract and its meaning lay at the center of the dispute"). In the instant case, the issue of whether employees were entitled to be paid for the accrued sick leave they had remaining on May 31, 2003 (at the end of the contract year), presents no question of contract interpretation at all. The contract language explicitly and unequivocally provides for that benefit and the Respondent does not argue that there is another way to interpret the relevant language.[15] To the extent there are questions about whether employees were entitled to receive additional sick and vacation leave benefits, those questions depend not on an interpretation of the contract language, which again is unambiguous, but primarily on Board precedent concerning a party's obligation to give effect to contractual terms after a contract's expiration and during a lockout. Moreover, with regards to both the denial of sick leave and the denial of paid vacation, the Respondent contends that it met any bargaining obligation it had under Section 8(a)(5) by offering to discuss the denial of leave during negotiations for a new contract. Whether the Respondent is correct in that contention is not a matter of contract interpretation, but of applying the relevant precedent regarding the Respondent's bargaining obligations to the facts of this case. These are the sort of legal questions that fall within the special competence of the Board, not that of an arbitrator. *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB 321, 322 (1998).

With respect to the denial of paid vacation, the Respondent attempts to cast the issue as one of contract interpretation by noting that the agreement provides that employees may not take "vacation pay in lieu of vacation" and by contending that how that proscription should be interpreted during a lockout is a question that must be answered by construing the contract and the past practices under the contract. The Respondent might be able to make a credible argument along these lines if it had only denied employees the opportunity to take vacation pay in lieu of paid vacation time. However, the record here shows that the Respondent denied paid vacation, not just pay in lieu of vacation. As discussed above, the Union requested information showing how much leave was left for each employee so that it could seek the remaining benefits for those employees. In the March 1 letter, the Respondent answered by announcing, inter alia, that employees were not entitled to any "paid vacation time" after the expiration of the contract since the vacation

[15] The contract provision, which is set forth more completely above, states in relevant part: "Unused sick leave pay shall be paid to the employee at the end of each contract year and shall not be accumulated from year-to-year."

provisions were no longer in effect. Therefore, it does not matter whether the contract should be interpreted to permit employees to receive vacation pay "in lieu of" paid vacation during the lockout, because the Respondent was denying employees the vacation pay that *accompanies* paid vacation, not vacation pay "in lieu of" vacation. As is discussed below, the Board has repeatedly upheld the right of employees to take their accrued paid vacation time even if they are already off-work due to a strike or lockout.

The Respondent also argues that there is a question of contract interpretation because the leave benefits are available only to employees who meet contractual requirements regarding length of service and percentage of days worked. However, those requirements are clearly and unambiguously set forth in the contract. The Respondent does not offer any interpretation of those requirements that creates a controversy regarding their meaning. The only questions raised by those requirements are ones of fact—i.e., have particular employees worked the requisite period of time and percentage of days. In its brief, the Respondent essentially concedes that at least some of the employees had unused accrued leave as of May 31, 2003. Respondent's Brief at 20–21. The Union's calculations showed that 15 of the 18 employees still had accrued leave left as of May 31, 2003.[16]

Even if I concluded that there was some issue of contract interpretation regarding the "in lieu of" provision that made deferral of the vacation leave claims permissible, I would not defer those claims since they are closely related to the sick leave claims, which do not involve that provision, are not deferrable, and must be determined by the Board in any case. Moreover, the Respondent has not even requested deferral of the issues involving the certification releases sought by Johns and Nagel. When a deferrable issue is closely related to a nondeferrable issue that must be determined by the Board, there is no compelling reason to defer one aspect of the dispute to arbitration. *Flatbush Manor Care Center*, 315 NLRB 15, 20 (1994). The Board has held that in such circumstances the interests of orderly procedure and fairness to all parties are served by declining to defer. *S.Q.I. Roofing*, 271 NLRB 1 fn. 3 (1984).

Although the above reasons are sufficient to warrant rejection of the motion to defer, I also note that the Respondent has not met the deferral criteria of showing there is "no claim of employer animosity to the employees' exercise of protected statutory rights." The General Counsel has, in fact, claimed that the employer bears animosity towards the employees' exercise of protected rights, see Complaint at paragraph 17 and General Counsel's Brief at 28–29, and, as discussed below, that claim is not without foundation.

[16] Although the record does not show how much various employees worked during the periods relevant to their further, post-May 31, 2003 leave accruals, most of those employees would qualify for additional leave given that 15 of them had more than 1 year of seniority, and, under the contract, would therefore be entitled to leave on a pro rata basis even if they had not worked enough to qualify for a full leave allotment. Determining the amount of leave to which each employee is entitled is appropriately reserved for the compliance phase of this case.

The Respondent's citation of *Lawson Co.*, 291 NLRB 792 (1988), does not alter my view that deferral would be inappropriate here. In *Lawson*, the Board deferred a matter to arbitration after the employer showed that a question of contract interpretation—whether striking employees were on "voluntary leaves of absence" for purposes of the employer's vacation leave practices under the contract—was central to the claim regarding unpaid leave. As discussed above, the problems of contract interpretation that the Respondent posits in the instant case have no bearing on the outcome of the case. Moreover, unlike in *Lawson*, in the instant case deferral would be inappropriate because there is a close interrelation between the vacation leave issues and other issues that are clearly not deferrable, and because there is a claim of employer animosity to contractual rights.

Accordingly, I deny the Respondent's motion to defer to arbitration the allegations that the Respondent denied employees accrued vacation and sick leave pay in violation of Section 8(a)(3) and (1) and Section 8(a)(5) and (1) of the Act.

2. Denial of accrued sick and vacation leave

I turn now to the merits of the complaint allegations that the Respondent discriminated against employees in violation of Section 8(a)(3) and (1) and failed to bargain in good faith in violation of Section 8(a)(5) and (1) by denying employees accrued sick leave and vacation benefits. As discussed above, the record shows that unit employees had unused, accrued, sick leave and paid vacation benefits based on services they provided to the Respondent prior to the contract's expiration and the lockout. On March 1, 2004, after the Union had tried unsuccessfully for several months to obtain information from the Respondent that would permit a calculation of the amount of leave to which employees were entitled, the Respondent announced its position that employees were not entitled to any paid vacation benefit at all as a result of the contract's expiration. Subsequently, the Respondent has not provided employees with any of their accrued sick leave and paid vacation benefits.

The Respondent's initial justification for refusing to provide employees with accrued sick leave and paid vacation benefits was that the contract had expired.[17] That rationale is meritless. With respect to employees' contractual entitlement to a payout for any accrued sick leave that they had on March 31, 2003, the argument based on the contract's expiration is without any basis whatsoever since the contract had not expired when that benefit became payable. The argument also fails regarding the other leave claims given clear Board precedent that an employer generally must "'continue to follow the terms and conditions . . . in an expired contract until a new agreement is concluded or good-faith bargaining leads to impasse.'" *Made 4 Film, Inc.*, 337 NLRB 1152 (2002), quoting *R.E.C. Corp.*, 296 NLRB 1293 (1989). This principle has repeatedly been applied to preserve the leave provisions in an expired contract. *Seattle-First National Bank*, 270 NLRB 389 (1984); *Vesuvius Crucible Co.*, 252 NLRB 1279, 1282 fn. 17 (1980), enf. denied 668 F.2d

[17] The Respondent made this argument in the March 1 letter and at trial in its written motion for dismissal or deferral, but does not present the argument again in its brief.

162 (3d Cir. 1981);[18] S*argent-Welch Scientific Co.*, 208 NLRB 811, 812, 819–821 (1974); *Ottawa Silica Co.*, 197 NLRB 449 (1972). The Respondent has not offered any precedent showing that an exception to the general rule is warranted in the instant case, nor has it claimed that a new agreement was concluded or that impasse was reached at the time it unilaterally discontinued the leave benefits. Therefore, it is clear that the leave provisions in the expired contract remained in effect subsequent to the contract's expiration. This means that the terms of the contract continued to apply not only to leave that accrued prior to the contract's expiration, but also to the additional benefits that employees' accrued after the contract's expiration on the basis of their prelockout work for the Respondent.

The Respondent's conduct in denying employees already-accrued leave benefits is also not justified by the institution of the lockout itself. In *Ottawa Silica Co.*, 197 NLRB at 449 fn. 2, the Board held that an employer violated Section 8(a)(1), (3), and (5) by refusing to award accrued vacation pay to locked-out employees, even though the lockout itself was lawful. Similarly, in *Sargent-Welch*, the Board held that an employer violated Section 8(a)(1) and Section 8(a)(5) of the Act by withholding employees' accrued paid vacation leave during a lawful lockout of employees. 208 NLRB at 819–821. The decision in *Sargent-Welch* was based on the application of principles set forth by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Although *Great Dane* concerned the discontinuation of accrued benefits during a strike, the Board has held that the same principles apply to cases where an employer discontinues accrued benefits during a lockout. *Central Illinois Public Service Co.*, 326 NLRB 928, 935 (1998), review denied 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000).[19] As explained in *Sargent-Welch*, the denial of accrued benefits may be shown to be a violation of Section 8(a)(3) and (1) under *Great Dane* in one of two ways. First, if the employer's conduct is "inherently destructive of important employee rights" no proof of antiunion motivation is required and a violation may be found even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the effect of the employer's action is "comparatively slight" an antiunion motivation must be proven and the employer may defend by showing that it was motivated by legitimate objectives.

In this case, I find that the Respondent's conduct is a violation under either *Great Dane* test. First, Board law supports the view that antiunion motivation need not be shown in this instance because the Respondent's denial of accrued leave benefits during the lockout was inherently destructive of important employee rights. In *Sargent-Welch*, the judge suggested that the impact of an employer's decision to withhold, during a lockout, "moneys [employees] had earned through past services" was "so severe that the Board was free to infer antiunion motivation for that particular act, regardless of the cogency of the business considerations which prompted the lockout itself." 208 NLRB at 820. Similarly, in *Wallace Metal Products,* the Board found that the employer's denial of employees' accrued vacation benefits for the duration of a strike was "inherently destructive of employee interests" so that no showing of discriminatory motive was necessary. 244 NLRB 41 fn. 2 (1979). The Board held that the employer's conduct in *Wallace Metal* violated Section 8(a)(3) and (1), as well as Section 8(a)(5) of the Act. If anything, the impact of the Respondent's decision to withhold benefits in the instant case is more severe than in either *Sargent-Welch* or *Wallace Metal* since in those cases the employer only sought to withhold the benefits until after the labor dispute, whereas in the instant case the Respondent's position is that, during the lockout, employees permanently lost some, and possibly all, of their accrued leave benefits.[20]

[18] The Court of Appeals denied enforcement of the Board's order in *Vesuvius* based on the employer's interpretation of the contract provisions relating to leave, and did not question that the leave terms survived the expiration of the contract.

[19] The Respondent suggests that the question of whether leave was denied in violation of Sec. 8(a)(3) should be analyzed under the standards set forth in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). However, as indicated by the decision in *Central Illinois Public Service Co.*, 326 NLRB at 935, the Board has continued, post-*Wright Line*, to use the *Great Dane* standards to analyze the question of whether an employer violates Sec. 8(a)(3) by denying employees accrued benefits during a lockout.

[20] In *Bil-Mar Foods*, 286 NLRB 786, 787–788 (1987), the Board found that the employer's denial of vacation benefits during a strike was not "inherently destructive" conduct. In that case, however, the denial of leave was shown to be the result of the employer's reasonable, and long standing, interpretation of its labor contract. As discussed earlier, the Respondent's denial of benefits is not justified by any interpretation of the contract. In *Bil-Mar*, the Board also relied on the fact that the employer had no ongoing collective-bargaining relationship that could be hindered by the withholding of benefits. In the instant case, the existence of a bargaining relationship between the Respondent and the Union has not been questioned. Third, the employer in *Bil-Mar*, unlike the Respondent in the instant case, was only withholding employees' accrued benefits for the duration of the strike, not denying them permanently. For these reasons, I conclude that the Respondent's conduct constitutes a far greater insult to important employee rights under Section 7 of the Act than did the employer's conduct in *Bil-Mar.*

My conclusion is also not changed by consideration of the decision in *Nuclear Fuel Services*, 290 NLRB 309 (1988). In that case the Board found that it was not inherently destructive to refuse to provide employees with vacation pay during a strike. That ruling, however, was based on the conclusion that the employees had not actually accrued the vacation benefits they were denied. In the instant case, by contrast, employees had accrued significant amounts of leave based on services they rendered to the Respondent prior to the lockout, but were denied those benefits. In *Nuclear Fuel*, the Board also stated that the employer could lawfully refuse to provide vacation benefits to the strikers because the contract did not provide for vacation pay in lieu of vacation, but rather for "vacation only in between periods of active work." Id. at 309–310 fn. 7. Unlike in *Nuclear Fuel*, the vacation leave provision in this case does not require that the employees be actively at work immediately prior to the use of paid vacation leave. Moreover, as has been discussed previously, the Respondent did not deny employees vacation pay in lieu of vacation, but rather took the position that employees were not entitled to any paid vacation time. Lastly, in *Nuclear Fuel*, the employer told the employees that the vacation benefits would be available after the strike concluded. 290 NLRB at 312. In the instant case, the Respondent's position is that previously accrued leave benefits have been permanently forfeited during the lockout. Because of the differences between the material facts of this

The Respondent argues that the impact of the denial is "comparatively slight," amounting to only a few days. That assertion is not born out by the facts established by the record. As of May 31, 2003, 15 of the 18 unit employees had accrued, but unused, leave benefits. These remaining benefits ranged to as many as 21 days of paid vacation and 3 sick days per employee. Moreover, employees subsequently accrued additional leave on the basis of their prelockout service. The withholding of these benefits "earned through past services," was not "comparatively slight," especially for employees who were subject to the economic pressures of a lockout.

Even if I had concluded that the Respondent's conduct in denying the accrued leave benefits to employees was not inherently destructive of important employee rights, I would find that the Respondent violated the Act under the alternate *Great Dane* test. A review of the record indicates that the Respondent was withholding benefits on the apparent basis of the lockout and with antiunion animus. See *Central Illinois Public Service*, 326 NLRB at 935 (applying the second *Great Dane* standard, and finding a violation where the employer discontinued accrued benefits on the "apparent basis of the . . . lockout" and failed to come forward with a proof of a legitimate justification for the cessation). First, I note that the denial of benefits took effect at essentially the same time that the lockout began.[21] Such timing is an important factor in assessing discriminatory motivation and in this case shows a link between the denial of benefits and the lockout. See, e.g., *Detroit Paneling Systems,* 330 NLRB 1170 (2000); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994). Moreover, although the Respondent has at times attempted to explain the denial of some of the leave benefits at issue by reference to the contract's expiration, which occurred at the same time that the lockout began, the Respondent has offered no justification at all for its decision to deny the locked-out employees the sick leave compensation that became payable on May 31, 2003, prior to the contract's expiration. In the absence of any other explanation, I conclude that the Respondent's flagrant refusal during the lockout to provide that contractually required sick leave payout shows that the Respondent was withholding those, and other, leave benefits on the basis of the lockout. Moreover, the record does not show that the Respondent ever refused to allow employees to use their accrued leave benefits during periods when employees' services were not desired by the Respondent for reasons other than a lockout—e.g., when there was insufficient work.

An antiunion motivation is also revealed by the Respondent's repeated assertions that the certification releases and leave benefits that employees desired were available when employees resigned their bargaining-unit employment. The resignations that the Respondent was encouraging would not only have deprived the employees of their rights as members of the bargaining unit, but would also have depleted the Union's strength. The Respondent continued to use denial of the certification releases as a means of pressuring employees to resign their bargaining-unit employment even after SIRVA informed the Company that certification releases could be issued for locked-out drivers who remained employees of the Respondent. Additional reason to suspect antiunion animus is provided by the Respondent's conduct in falsely reporting that Johns and Nagel, both of whom openly participated in the union picket line, had failed to supply logbook entries for work performed on behalf of the Respondent. By making these false reports the Respondent interfered with the efforts of Johns and Nagel to obtain work during the lockout. The record suggests that it was unusual for such mistakes to be made in the moving industry, and the Respondent does not explain how it came to make the mistakes with respect to both of the employees on whose behalf certification releases had been sought. This record leads me to conclude that, when opportunities arose, the Respondent attempted to interfere with the ability of employees to obtain alternative means of economic support during the lockout in hopes of weakening those employees' support for the Union and/or forcing them to resign from the bargaining unit.[22]

I also conclude that the Respondent has failed to meet its responsive burden of proving that it was motivated by legitimate objectives. As has already been discussed, the Respondent has not offered, much less proven, that it had any legitimate motive for denying employees the sick leave payout that they became entitled to on May 31, 2003. With respect to the other leave benefits, the Respondent has offered various justifications, none of which are supported. As discussed above, a justification that the Respondent initially offered for denying the employees accrued leave benefits during the lockout was that the contract had expired. Board law establishes, however, that the Respondent was obligated to continue the leave provisions in effect during the hiatus between contracts, absent a bargaining impasse. The Respondent has not cited any authority which it claims gave it reason to believe that the clear Board precedent on this point did not apply here.

The Respondent also claims that it was privileged to deny the leave benefits based on a reasonable interpretation of the contract section which states that employees cannot take vacation pay "in lieu of" paid vacation. See *Bil-Mar Foods*, 286 NLRB at 788 (no violation when employer withholds vacation benefits on "a nondiscriminatory, reasonable, and arguably correct interpretation of the contract"). I note, first, that the provision cited by the Respondent applies only to vacation leave. The Respondent has not even claimed that this provision permitted it to deny accrued *sick* leave to employees. At any rate, the Respondent's reliance on the "in lieu of" language is a red herring even with respect to the denial of vacation benefits because the Respondent denied employees paid vacation leave and the vacation pay that accompanies it, not vacation pay "in lieu of" vacation. Therefore, the Respondent's denial of em-

case and *Nuclear Fuel*, I conclude that the Board's decision in that case is inapposite.

[21] Although the Respondent did not announce that it was withholding leave benefits until some time later, it did not provide any such benefits after the institution of the lockout.

[22] An employer's desire to avoid funding employees during a lockout is not a legitimate business justification for discontinuing benefits that employees earned through their prelockout work. *Sargent-Welch*, 208 NLRB at 819, 820.

ployees' accrued paid vacation benefit cannot be justified by reference to the "in lieu of" provision.

For the reasons stated above, I conclude that, under *Great Dane*, and the Board's decisions applying that decision, the Respondent violated Section 8(a)(3) and (1) by discontinuing employees' paid vacation and sick leave benefits during the lockout.

I also conclude that the denial of the employees' accrued vacation and sick leave benefits was a unilateral change in the established terms and conditions of employment and a violation of Section 8(a)(5) and (1). See *Wallace Metal*, 244 NLRB at 48; *Sargent-Welch*, 208 NLRB at 821; *Ottawa Silica*, 197 NLRB at 449 and 459. The Respondent contends that it met its obligation to bargain by offering the Union the opportunity to discuss the matter during the negotiations for a new contract. The Respondent did make such offers to the Union, but it is not good faith bargaining to require a Union to negotiate in order to receive previously bargained-for benefits that employees are already owed. Id. Moreover, as discussed above, the Respondent was required to continue to abide by the leave provisions of the expired contract until the parties reached a new contract or impasse. See *Made 4 Film, Inc.*, 337 NLRB at 1152. Therefore, even assuming that employees' already-earned benefits were a legitimate subject in the negotiations for a new contract, the Respondent acted unlawfully by unilaterally changing those entitlements at a time when the parties had not reached a new contract or impasse. See, e.g., *Ottawa Silica*, 197 NLRB at 449 (employer violates Section 8(a)(5) by its "unilateral refusal to award holiday and vacation pay to the locked-out employees until after the parties had completed negotiations on a new collective-bargaining agreement").

3. Refusal to provide certification releases

The General Counsel also alleges that the Respondent violated Section 8(a)(3) and (1) by discriminatorily refusing to issue the certification releases that Johns and Nagel needed in order to perform certified work with other movers operating under the SIRVA umbrella. The record in this case shows that the Respondent refused to execute the certification releases, and repeatedly told the Union that it would execute the releases if the employees resigned from their bargaining-unit employment. In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth standards for determining whether an employer has discriminated against an employee on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, 330 NLRB at 1105. The Respondent cannot meet its *Wright Line* burden merely by showing that a legitimate reason factored into its decision. Rather, the Respondent must show that the legitimate reason would have resulted in the same action even in the absence of the employee's union and protected activities. *Monroe Mfg.*, 323 NLRB 24, 27 (1997).

The evidence satisfies the General Counsel's initial burden in this case. Both Johns and Nagel openly attended the picket line that unit employees formed outside the Respondent's facility after being locked out by the Respondent. As discussed above, the Respondent had demonstrated animosity towards protected activity by, inter alia, unlawfully withholding leave benefits that employees were entitled to during the lockout. The Respondent's repeated statements that it would issue the certification releases to locked-out employees if they resigned their bargaining-unit employment evidences that the antiunion animus is linked to the conduct alleged to violate the Act.

Since the evidence satisfies the General Counsel's burden of showing that the Respondent's actions were motivated, at least in part, by antiunion considerations, the burden shifts to the Respondent under *Wright Line*, supra, to show that it would have taken the same actions even in the absence of the unlawful animus. See *Senior Citizens*, 330 NLRB at 1105.

The Respondent argues that its refusal to issue the certification releases for Johns and Nagel is explained not by any improper animus, but by the company's practice of releasing an individual from his certification only when that individual's employment ended. The record shows that SIRVA and NAVL did generally prohibit certified drivers with one affiliated mover from starting work as a certified driver with another affiliated mover unless the employee's employment with the first company had ended. The Respondent's practice consistent with these rules was to issue certification releases only for individuals whose employment with it had ended. Nevertheless, I conclude, based on the totality of the evidence, that the Respondent would not have applied its practice to refuse the releases under the circumstances present here if not for the unlawful motivation. The record shows that the responsible SIRVA official informed the Respondent that, given the labor dispute, SIRVA would permit the Respondent to release the drivers from their certification even if those drivers remained employees of the Respondent. When the Respondent refused that option, the same SIRVA official offered another solution—SIRVA would permit the employees to be "cross-certified" with the Respondent and the other employers with whom they were seeking employment during the lockout. The Respondent rejected that solution as well. SIRVA was the parent company of the van line with which the Respondent was affiliated for purposes of the certification of drivers and certified work. SIRVA and NAVL, not the Respondent, were the entities that evaluated whether a driver should be certified and issued the safety number that established the driver's certification. The Respondent's certification releases were only required for employment by other SIRVA-affiliated companies. Given this background, I find it hard to believe that the Respondent would not have responded favorably to SIRVA's offers to accommodate the locked-out drivers if not for the Respondent's unlawful

motivation. Indeed, when SIRVA made the dual-certification proposal, Squire explicitly complained that the drivers were trying to "stay in the union at [the Respondent]." Even after SIRVA gave the Respondent the go-ahead to issue the certification releases for drivers who remained employees, the Respondent continued to represent to the Union that such releases could not be issued unless the driver resigned.

The Respondent's claim that it would have taken the same actions based exclusively on legitimate motives is further undermined by the false reports that the Respondent made regarding missing log entries for Johns and Nagel. The Respondent claims that these were mistakes, but additional explanation is called for since such mistakes were uncommon and the Respondent made the same "mistake" with respect to both of the locked-out employees who needed releases. The Respondent has provided no additional information to explain this unlikely occurrence. As discussed above, the Respondent's unlawful denial of the employees' earned leave, the denial of the releases, and the false reports regarding employees' logs evidence a pattern of interference with the efforts of the unit employees to find ways to endure the lockout without resigning their bargaining-unit employment. That is not a legitimate business purpose, but unlawful discrimination. See *Sargent-Welch*, 208 NLRB at 819, 820 (employer's desire to avoid financing a lockout is not a legitimate basis for denying employees benefits earned through prelockout service); see also *Christie Electric Corp.,* 284 NLRB 740, 759 (1987) (respondent's statement that employees could not take positions with other employers during a strike and maintain their status as employees of respondent violated the Act since it interfered with employees' "right to obtain interim employment as a means of enduring the strike").

The Respondent also claims that it withheld the releases out of fear that the Union would charge that issuing the releases was an unfair labor practice. I consider this claim implausible given that SIRVA had informed the Respondent that it could issue the releases for locked-out drivers without terminating those drivers from their bargaining-unit positions. Therefore, the only apparent effect of the releases would be to ease the economic pressure that the lockout was placing on the locked-out employees. The Respondent has not claimed that the Union ever suggested that it would object to that, or even posited a reason why the Union might object.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(3) and (1) by discriminatorily withholding the certification releases that Johns and Nagel needed in order to obtain certified work with other SIRVA-affiliated movers.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5).

3. The Respondent violated Section 8(a)(3) and (1) by discriminatorily discontinuing employees' paid vacation and sick leave benefits and by discriminatorily withholding certification releases for Timothy Johns and John Nagel.

4. The Respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing employees' paid vacation and sick leave benefits.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. With respect to the denial of sick leave benefits, the Respondent must provide employees with the payments for any unused sick leave they had on May 31, 2003, and for any additional unused sick leave[23] they had on May 31, 2004. With respect to vacation leave, the Respondent must provide employees with the vacation pay that, under the expired contract, would have accompanied the employees' use of their accrued vacation leave if the Respondent had not unlawfully denied employees the use of such leave during the lockout. This includes vacation pay for all accrued vacation leave that employees had remaining on December 22, 2003, when the Union requested such leave on behalf of employees. The Respondent also must provide employees with vacation leave pay for additional paid vacation leave that employees accrued on their anniversary dates after December 22, 2003, but which they earned on the basis of their prelockout service. Employees who reached anniversary dates after the start of the lockout, but prior to the Union's request of December 22, 2003, are not entitled to receive vacation pay for any portion of the vacation leave allotment that they accrued at their previous anniversary date, but had not used during the succeeding 12 months, since under the Respondent's established practices that leave expired. That limitation will not apply if, during the compliance stage, it is shown that a request was made for the employee's remaining accrued vacation benefit prior to the expiration of that leave. The Respondent must also make Timothy Johns and John Nagel whole for any loss of wages and benefits that they may have suffered as a result of the Respondent's unlawful refusal to provide the necessary certification releases. Interest on all of the above payments should be paid as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition to requiring the Respondent to post notice, I will require it to mail copies of the notice at its own expense to all employees who were members of the bargaining unit on May 31, 2004. Mailed notice is necessary because the Respondent has not permitted those employees to enter the facility where notice is to be posted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[24]

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[23] As discussed above, qualifying employees acquired a new allotment of sick leave on June 1, 2003.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, University Moving & Storage Co., Farmington Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily discontinuing unit employees' paid vacation and sick leave benefits.

(b) Failing and refusing to bargain collectively and in good faith with the Union by unilaterally discontinuing unit employees' paid vacation and sick leave benefits.

(c) Discriminatorily withholding certification releases for employees, or discriminatorily delaying their issuance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all unit employees and former unit employees for the unlawful denial of sick leave benefits by providing them with the sick leave payments they were entitled to under the expired contract in the manner set forth in the remedy section of this decision.

(b) Make whole all unit employees and former unit employees for the denial of vacation leave benefits by providing them with the vacation pay that, under the expired contract, would have accompanied the employees' use of their accrued vacation leave if the Respondent had not unlawfully denied the use of such leave, in the manner set forth in the remedy section of this decision.

(c) Make whole Timothy Johns and John Nagel for any loss of wages and benefits they may have suffered as a result of the Respondent's discriminatory withholding of certification releases for those employees, with interest as set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of payments due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Farmington Hills, Michigan copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time May 31, 2003.

(f) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix, at its own expense, to all employees in the bargaining unit who were employed by the Respondent at its Farmington Hill, Michigan facility, as of May 31, 2003. The notice shall be mailed to the last known address of each such employee after being signed by the Respondent's authorized representative.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 29, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily discontinue your paid vacation and/or sick leave benefits.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union by unilaterally discontinuing your paid vacation and/or sick leave benefits.

WE WILL NOT discriminatorily withhold or delay issuance of certification releases.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all unit employees and former unit employees whole for the unlawful denial of sick leave benefits by providing them with the sick leave payments they were entitled to under the expired contract.

WE WILL make all unit employees and former unit employees whole for the denial of vacation leave benefits by providing them with the vacation pay that, under the expired contract, would have accompanied the employees' use of their accrued vacation leave if we had not unlawfully denied the use of such leave.

WE WILL make Timothy Johns and John Nagel whole for any loss of wages and benefits they may have suffered as a result of

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

our discriminatory withholding of certification releases for those employees.